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In the Supreme Court of the United States.

OCTOBER TERM, 1904.

JOHN J. MOORE, TRADING UNDER the firm name of J. J. Moore & Co., appellant,
v.
THE UNITED STATES.
} No. 71.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

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STATEMENT.

Appellant was at the time of the matters complained of in the petition a general commission merchant and shipper, engaged in business at the port of San Francisco, Cal.

In June, 1898, he sold to the United States, through its proper representative at said port, under two separate contracts, about 8,900 tons of coal, to be delivered "on the wharf" and "on the wharf as customary" at Honolulu, Hawaiian Islands, for which the United States agreed to pay a stipulated price.

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When the vessels chartered by appellant carrying the coal arrived at the port of Honolulu they experienced some delay in discharging their respective cargoes, due to the fact that they were unable to get a berth at the wharf at that port promptly on their arrival.

The first and most important issue in this case arises from the cause and effect of the delay of the vessels in procuring a berth at the wharf at which to discharge cargo.

The real cause of the delay was the operation of the regulations governing the use of the wharves at the port of Honolulu. At the time of the arrival of the vessels carrying the coal the Hawaiian Islands had not passed under the control of the United States. The port of Honolulu was consequently a foreign port, its harbor being under the supervision and control of an officer of the Hawaiian Government called a "harbor master." The vessels arriving in the harbor were anchored by the harbor master upon their arrival, and subsequently assigned to berths at the wharves of the harbor by him *in the order of their arrival.* The United States had no wharf at the port, nor other means of receiving cargoes, and had no authority or control whatever over the harbor master. At the time of the arrival of the vessels carrying the coal in question the harbor was crowded, a number of vessels being moored at the reef. (Finding 6, R., p. 12.)

The vessels carrying the coal in question were, as a matter of fact, assigned to berths at the wharf by the

harbor master in the order of their arrival at the port. Some of the vessels carrying the coal were compelled to lie at anchor in the stream for a number of days previous to being assigned to berths. (Finding 4, R., pp. 11 and 12.)

Under these circumstances it is perfectly clear that the thing which caused said vessels to be detained at the port beyond their respective "lay days" was, as we have stated, the result of the operation and execution of a law or regulation of the Government in authority at the port of delivery.

Appellant actually paid the owners of certain vessels carrying the coal demurrage for the days said ships were detained at the port after the expiration of the "lay days" stipulated for in the charter parties between the shipowners and the appellant. (Finding 4, R., p. 12.)

It is the contention of the appellant that under the law and the contract or contracts between him and the United States for the purchase and sale of said coal the United States is answerable for the sum thus expended as damages in the nature of demurrage resulting from said delay. In other words, it is the contention of the appellant that the United States must respond to the appellant for damages to the amount paid the owners of said vessels as demurrage by appellant under his contract with their owners, although the United States was in no way privy to said contracts, and regardless of the fact that it was powerless to avoid the delay ensuing from the operation of the law and custom of the port of Honolulu relative to docking vessels.

It is our contention that inasmuch as the United States was in no way responsible for the delay of the vessels in reaching a berth at the wharf and was in no way able to avoid this delay, the loss does not and can not fall upon the United States.

There was no delay in receiving the coal after the arrival of the vessels carrying the same at the berth assigned to them by the harbor master except in one instance. The bark *Harvester* exceeded its "lay days" two days while discharging at the wharf, but it does not appear that the United States was at fault in causing this loss of time in discharging said cargo. (Finding 4, R., p. 12.)

The second issue in this case arises from the facts stated in the fifth finding of fact (R., p. 12).

The contract provided for the delivery of "about 5,000 tons" (R., p. 8).

Appellant shipped on board the bark *Harvester* and the ship *General Gordon* 4,634 tons, delivery of which, under the contract, was completed from the *General Gordon* October 4, and from the *Harvester* October 7, 1898. (Finding 4, R., p. 12.)

About one month subsequent to the completion of the delivery as aforesaid the appellant purchased from a vessel then in the harbor of Honolulu 366 tons of coal, being the amount necessary to make complete delivery of the 5,000 tons mentioned in the second contract, and tendered the same to the United States. The United States, by its properly authorized agent, refused to receive said 366 tons of coal, whereupon

the appellant sold the same in the open market for the best price he could obtain, which was $1,120.87 less than the contract price. (Finding 5 R., p. 12.)

It is the contention of the appellant that he was bound to deliver the full 5,000 tons and that the United States was bound to receive and pay for the same. It is our contention that the United States, under the facts and circumstances above related, was warranted in assuming that appellant had completed his contract when he delivered the cargoes from the two vessels above named, the amount so delivered being "about 5,000 tons," and that in any event it was not obliged under the contract to receive and pay for the 366 tons offered as aforesaid.

Some minor facts with relation to this transaction are found by the court, but they will be noticed in the course of the argument.

ARGUMENT.

These facts present two propositions for argument: (1) Was the United States obliged, under the contracts in question, or by law, to furnish a wharf at which the vessels carrying the coal could discharge their cargo, within twenty-four hours after receipt of notice of the arrival of said vessels at the port of Honolulu; in other words, did "lay days" begin to run within twenty-four hours after the receipt of said notice? And (2) was the delivery of 4,634 tons of coal at the time and place it was delivered a completion of the second contract with reference to the amount of coal stipulated to be delivered thereunder?

1. The first contention of appellant is that the contracts for the purchase and sale of the coal in question should have read into them the custom and usage at the port of San Francisco with reference to the beginning of "lay days" and the payment of demurrage for any time the vessel might be held in excess thereof.

The learned counsel for appellant devotes considerable space in his brief to an exposition of the well-known doctrine of law that custom and usage known to the parties may be incorporated in their contracts where nothing is said therein to the contrary. As an abstract proposition there is no room for dispute about this, but we submit that the principle is only to be applied where the custom and usage relate directly to the subject-matter of the contract.

It will be observed that the contracts between the appellant and the United States are silent as to the carriage of the coal in question. Under those contracts the appellant bound himself to deliver the coal "on the wharf" and "on the wharf as customary" at Honolulu. The United States bound itself to receive the coal "on the wharf" and "on the wharf as customary" at Honolulu at the rate of not less than 100 tons per day, that is per working-day, and to pay therefor a stipulated price. What could be plainer or more unambiguous than these provisions of the contracts? Is it reasonable to suppose that the agent of the United States in the premises understood when he made these contracts that he was obligating the United States to pay a fixed and definite amount of demurrage

in case the vessel was compelled to lie in the harbor of Honolulu awaiting its turn at the wharf? The Court of Claims finds as a fact with reference to this matter:

> It does not appear that the officers and agents of the defendant who were authorized to make and (who) did make the contracts for the defendants had any knowledge or notice of such custom, nor that the contracts, or either of them, were made in view of such custom. (Finding 3, R., p. 11.)

The agent of the United States had no authority to make any contract for the carriage of the coal. His authority simply extended to the purchase of the coal. Even if the custom was so well established that it could be said the United States agent knew it, because he ought to know it, it can not be made a part of the contract in question. To hold that it should, would be to enlarge the contract, not to explain it.

It is not denied that, as a matter of law, the United States would have been liable for demurrage under said contracts if it had been derelict or in fault in causing the delay which occurred at the port of discharge. That is to say, if the vessel had reached the wharf and the United States failed, for *any* reason, to remove the coal therefrom fast enough to permit the vessel to discharge the 100 tons thereon for each working day thereafter, or if the United States had in any way prevented the vessel from coming to the wharf or caused it to lose its "turn," it would have been answerable for damages in the nature of demurrage in such amount as

might, under all the circumstances, be deemed just and proper. But it seems clear to us that if there is any liability on the part of the United States it is not because of any express stipulation contained in its contract for the purchase of the coal, or because of any stipulation to be incorporated into the contracts by reason of the existence of the custom among shipowners and shippers at the port of San Francisco.

If custom and usage are to be called into service for the purpose of interpreting or explaining the contracts in question, the custom of the port of discharge, so far as it relates to the manner and mode of discharge, must regulate and determine the contracts. Carver, in his work on Carriage by Sea (par. 461), says:

> The manner of discharging also is, in the absence of special terms, to be determined by reference to the regulations and practices of the port of discharge. These will show whether the goods should be discharged in the open water or at wharf or any dock, and whether on the wharf or quay or into a hulk or lighters alongside the ship. If one or more of these methods is commonly adopted and is suitable for the particular ship and cargo, it would seem that the shipowner satisfies his contract by delivering according to any one of them he may choose, but if one mode of discharge involves charges upon the consignee which another and suitable and convenient mode avoids, the shipowner can not, contrary to the consignee's demand, insist upon adopting the former.

The liability of the United States in this instance is that of consignee.

> In such case, the only liability, if any, is for damages in the nature of demurrage for failure to use reasonable diligence in discharging in accordance with the *custom of the port.*
>
> (Am. and Eng. Encl. of L., vol. 9, p. 229, new ed.). (*Houge* v. *Woodruff*, 19 Fed. Rep., 136.)
>
> The general rule is that the consignee is not liable for delay due to causes *beyond his control.* (Am. and Eng. Encl. of L., vol. 9, p. 257, new ed.)
>
> He is not liable if the delay is due to interference of the Government or public authorities. * * * Where the consignee is not bound by the contract to furnish a berth and where the vessel is required to take its turn in unloading, *he is not liable for delay caused by an extraordinary accumulation of vessels to be unloaded.* (Id., p. 258.)

It has been held in any number of cases that where the vessel arriving is obliged, either by the custom of the port, or the contract, or bill of lading, to await its turn in discharging, the consignee is not liable for damages in the nature of demurrage resulting from delay caused by the harbor being overcrowded with vessels. In the case of the *J. E. Owen and other vessels* v. *49,774 Bushels of Rye* (54 Fed. Rep., p. 185) this doctrine was clearly and unequivocally stated by the learned judge. In that case the bill of lading had no provision in it for "lay days" or demurrage. The vessels were loaded with grain from Chicago to Buffalo. When they arrived at Buffalo there were twenty-eight boats ahead of them—an unprecedented number. There was a delay of several days to the boats in

question in getting into position at the usual place of discharge for such cargoes, due entirely to the fact that said vessels had to await their turn to discharge. The court, after reviewing the facts in the case, held that the consignees were not liable for the damages resulting to the shipowners from a delay of ten days in unloading. The court says (p. 188):

> After an examination which was intended to be thorough, I fail to find a single authority allowing damages in circumstances like those developed in the case at bar. Vessel owners can stipulate for "lay days" if they so desire, but if they prefer not to do so they must take the risk of delays occasioned by such phenomenal circumstances as these which occurred at Buffalo in November and December, 1891.

In support of its decision the court cites (p. 187):

Riley v. *Cargo of Iron Pipes*, 40 Fed. Rep., 605.
Cross v. *Beard*, 26 N. Y., 85.
Wordin v. *Bemis*, 32 Conn., 268.
The Glover, 1st Brown, Adml., 166.
Clendaniel v. *Tuckerman*, 17th Barb., 184.
Towle v. *Kettell*, 5 Cush., 18.
Weaver v. *Walton*, 5th Chi. Leg. N., 125.
Abbs. Shipp., 311–313.
Fulton v. *Blake*, 5th Biss., 371.
Rodgers v. *Forresters*, 2d Camp., 483.
Burmaster v. *Hodgson*, Ed., 488.
The M. S. Bacon, 3rd Fed. Rep., 344.
Coombs v. *Nolan*, 7th Ben., 301.
Velatty v. *Curtis*, 41 Fed. Rep., 479.
The Elida, 31 Fed. Rep., 420.
The Mary Riley v. *3,000 Railroad Ties*, 38 Fed. Rep., 254.

Every one of these cases goes to sustain the proposition we have presented.

See also *Empire Transportation Co.* v. *Phila. and R. Coal and Iron Co.* (77 F. R., 919).

> In the absence of any custom or express contract to the contrary, it is the ship's business to find a berth in the port of discharge. (*Smith* v. *Granite Paving Co.*, 56 Fed. Rep., 525–527.)

In the case at bar, there was not only no express contract binding the consignee to find a berth, but, on the other hand, there was a positive and distinct custom which rendered it impossible to do so.

The general rule is, as has been before stated, that the consignee is not liable for delay due to causes beyond his control. The delay of the vessels in question in getting to a berth at the wharf was certainly caused by matters beyond the control of the agents of the United States at said port. It was due entirely to the interference of the government, or public authorities of the government, of Hawaii. Reference to the contract involved in this case will show that no set terms were agreed upon as to the manner of discharging further than that the cargoes were to be discharged "on the wharf." The facts as found by the Court of Claims show that at the port of Honolulu, which was under the control of the Hawaiian government at the time, there was a regulation enforced by the proper officer of said government which compelled the ships carrying the coal in question to await their turn in coming to the wharf or usual place for discharging coal. It

was not customary to receive cargoes of coal in lighters at said port. It was customary to receive it only at three of the eleven wharves or docks at said port. As a matter of fact, the vessels carrying the coal in question came to the wharves for the purpose of discharging under and in compliance with this rule and regulation. It was not possible for the agents or officers of the United States to have furnished lighters into which the cargo could have been discharged, nor was it their duty, under the contract or the law, to do so. Having no control over the wharves or the officers of the Hawaiian Government in charge of the harbor, said officers and agents of the United States were powerless to furnish a wharf or to expedite in any way the assignment of said vessels to a berth at the wharf. It may be argued in favor of the appellant that neither he nor the ships' owners or masters could have avoided the delay which occurred. That is true; but both the charterer (the appellant) and the owners of the vessels were necessarily familiar with the custom prevailing at the port of Honolulu with reference to discharging vessels. But even if they were not familiar with said custom and usage, it does not alter the fact that the liability of the United States is to be determined by the rules, customs, and practices of the port of discharge.

Where the consignee is not bound by the contract to furnish a berth (and the consignee in this case certainly was not), and where the vessel is required to take its turn in unloading (the vessels in this case certainly were), he is not liable for delay caused by an extraordinary accumulation of vessels to be unloaded. Such

is the principle to be gleaned from the authorities heretofore cited. Reasonableness is all that is required of the consignee with reference to the receipt and disposal of a cargo in all shipping contracts, and as we have before stated, where the charter party or the bill of lading is silent as to the matters in dispute here, reasonable conduct only is required.

> *Whiteside* v. *Halstead*, 90 Ill., 95;
> *Etten* v. *Newton*, 134 N. Y., 143;
> *Dayton* v. *Park*, 142 N. Y., 391.
> American and English Enc. of Law, vol. 9, p. 255, new ed., and cases cited under note 3.
> Carver's Carriage by Sea, par. 636; 7 Comp. Dec., 573.

It will no doubt be answered that this rule applies as well to the appellant as to the appellee, and that inasmuch as the vessels were not at fault in the delay in reaching a berth at the wharf, the loss should not fall on them. But the answer to that proposition has been already given in the statement of the fact that vessel owners and charterers all over the world, where the contract is not specific, are held to abide by the rules and customs and usages of the port of discharge with reference to matters of this kind, and that therefore the loss must rest where it falls.

Parsons, discussing contracts of affreightment, says (vol. 2, p. 423), with reference to the time when freight becomes due:

> If the ship can not reach the port by reason of blockade or any similar cause, this, though not the fault of the ship, is its misfortune.

The same principle applies here. If the ship can not claim freight until it has arrived at the place of discharge, it certainly follows that "lay days" do not begin until it has reached the designated place of discharge, which in this case was the "wharf."

Counsel for appellant has, at considerable length and with great erudition, shown that damages in the nature of demurrage are recoverable, in the absence of an express contract therefor, under certain circumstances. We have already admitted that the United States might legally be liable for such damages if the same were the result of its neglect, default, or miscarriage, but we insist that the facts do not make a case of default, neglect, or misconduct on the part of the United States, its officers or agents.

The only possible question which it seems to us yet remains for discussion in relation to this proposition is as to the time when the "lay days" prescribed for such vessels began to run. It is conceded that the contracts between the appellant and the United States fix the number of "lay days" for the discharge of each vessel in that article or provision of the contract wherein it is stipulated that said vessels shall be discharged at the rate of not less than 100 tons per day. It is insisted by counsel for appellant in his brief, and many authorities are cited by him in support of his proposition, that these contracts having fixed the number of days within which the vessels should be discharged, the United States was responsible and liable for its failure to receive the cargo within the specified

number of days, beginning twenty-four hours after notice of the arrival of the vessel in port; that is to say, in the case of the vessel *Euterpe*, for instance, which if it had been discharged at the rate of 100 tons per day, beginning twenty-four hours after its arrival in port, would have been discharged within sixteen days, but the discharge of which was not completed until thirty days after the arrival of the vessel at the port, he insists the United States was liable for the fourteen days during which the vessel was compelled to lie in the harbor awaiting an opportunity to come to the wharf to discharge its cargo.

No doubt if the vessels had been prevented, *after they arrived at the wharf*, from discharging one hundred tons of coal thereon per day by reason of dereliction or fault on the part of the United States, it would have been liable for damages resulting from such delay, and that is the gist of every decision cited by counsel for appellant in his brief.

The general rule is that "lay days" for unloading do not commence when the vessel arrives in the port of discharge. (*Brown* v. *Johnson*, 10 M. & W., 331.)

> They are to be computed from the time she arrives at the place of discharge *usual for such vessels in the particular port*, ordinarily at the wharf or dock, and is ready to discharge there in accordance with the contract *and the custom of the port.* (Italics are ours.) Amer. and Eng. Enc. of Law, vol. 9, p. 231, new ed.
>
> The vessel does not fulfill its contract by stopping at the entrance of the port of discharge, but must proceed to the very berth or

dock designated, if one is named in the contract, but if not, *to the place customarily used for discharge by vessels loaded with similar cargoes.*

Bereton v. *Chapman*, 5 Moo. P, 526.

Bremner v. *Bunell*, 4 Sess. Cass., 934.

In the case at bar, the facts show that the usual place of discharge for coal was one of three wharves to which the vessels in question were assigned and came in the order of their arrival at the port, in accordance with the custom of the port.

Carver, in his work on Carriage by Sea, paragraph 622, says:

> It is often a matter of great difficulty to determine when the lay days are considered to have commenced or, if no lay days are fixed, to determine when the charterer's responsibility for the detention of the ship attaches. Speaking generally, the ship must have arrived at the place agreed upon for the loading or discharging, and must be ready to take in the cargo or deliver it, as the case may be.
>
> But the place named is usually one of wide extent, comprising areas where the work of loading or unloading would in a practical sense be impossible, and thus the question arises whether the ship must be lying in any particular part of the named place of loading or discharge; also the further question of who is to bear the burden of delay if the shipowner is prevented by causes for which he is not responsible from at once ` ` ging the ship to the spot where she ought t be.

Further along the author says, if the place of discharge named be a particular wharf:

> The ship must get alongside that wharf before the charterer can be required to load or take delivery, and he will not be responsible for a delay in getting alongside due to the set of the tide or to the occupation of the wharf by other ships. The wharf is the place at which only the charterer has undertaken to do his part. Therefore, generally the lay days do not begin until the ship is ready for him *there*.

See also authorities cited under Note F, id., page 710.

In the case at bar a particular wharf was not designated by name, but it was specifically and definitely stated in the contract between the appellant and the United States that the coal in question should be delivered at *a* wharf in the port of Honolulu and the facts found show that only one of three places at said port would conform to this requirement. To one of these places the ships in question must come before "lay days" would commence to run, and the consignee (the United States) was not liable for delays to the ships in coming to said place or places caused by the occupation of the same by other ships.

So it seems clear that the "lay days" provided for said vessels should not be held to begin to run against the United States until after the arrival of the vessels in question at the wharf. It appears from the facts that the ship *Euterpe* arrived at the wharf at 2.15 p. m.

on the 8th day of August, 1898, and commenced discharging coal the same day, and finished August 29, 1898, thus consuming eighteen working days. Said vessel had on board 1,543 tons of coal. Had she been discharged at the rate of not less than 100 tons per day (the amount stipulated in the contract), the time consumed would have been sixteen days. It therefore appears that after said vessel arrived at the wharf she was detained two days beyond her regular "lay days," but it does not appear that the United States was the cause of said detention. On the contrary, it does appear that the United States was willing and ready and able at all times to have taken the coal at the contract rate of 100 tons per day. (Finding IV, Rec., p. 11.) The burden of proving that the detention was due to some fault or negligence on the part of the United States was upon the appellant. (54 Fed. Rep., 185–186.) There was no delay in discharging the other vessel, the *General Gordon*, after it reached the wharf; that is, she was discharged within the stipulated number of days after her arrival at the wharf

Counsel for appellant refers to the fact that there is a paucity of cases bearing upon the question involved in this case. He says this is probably attributable to the fact that parties situated as the United States is in this case have not heretofore disputed their liability to pay demurrage under such circumstances, but have without question settled all claims of that character, thereby precluding the possibility of such cases getting into court. We think it will appear from the authori-

ties cited by us that this is a mistake of fact. But if it were true, it would be just as reasonable and sound for us to say that the reason therefor was because persons situated as the shipowners in this case, or as the shipper and charterer (the appellant), have not had the temerity, to say the least, to institute legal proceedings to collect such damages as are here claimed.

Counsel also lays great stress on the rule of construction that wherever doubt arises as to the interpretation to be put upon contracts liberality of construction should be indulged in in favor of the person who merely signs the contract and against the one who draws the same. The existence of such a rule in the construction of contracts is not disputed. Its efficacy, however, is a matter of varying views by the authorities. In applying it it should always be remembered that other rules are given for the construction of contracts, such as the application to doubtful words of their usual and ordinary meaning, etc., which take precedence over the rule *contra pro forentum*.

> The reason for the rule is that men generally are supposed to take care of themselves in making contracts, and that he who gives and chooses the words by which he gives ought to be held to a strict interpretation of those words rather than he who only accepts. But the reason is not a very strong one, nor is the rule of special value. It is, indeed, often spoken of as one not to be favored or valued unless other principles of interpretation fail to decide a question. (Parsons on Contracts, vol. 2, p. 663.)

See *Adams* v. *Warner* (23 Vt., 411).

But however efficacious or necessary the rule may be in ordinary cases, it is of no use in the case at bar. There is nothing ambiguous or uncertain about the contract with reference to the sale or delivery of the coal. It was to be delivered "on the wharf" and "on the wharf as customary" at Honolulu. It is not necessary to invoke any of the rules of construction or interpretation to determine what those words mean. There is no room for construction, and consequently nothing for construction to do.

If this rule has any application at all in this case, it is as to the second proposition, and if applied there it would be a stricture upon the argument of the appellant in this case, for the reason that the word "about," which is the turning point of the questions involved in the second proposition, was introduced into the language of this contract by the appellant himself, as is well stated by the Court of Claims in its opinion.

Before taking up this second proposition for discussion, we beg to call the court's attention to the fact that the Court of Claims was unanimous in its opinion regarding the claim of appellant for demurrage in this case. We do this for the reason that counsel for appellant has referred in at least two places in his brief (pages 7 and 11) to the "majority" opinion of the court in such a way as to leave the impression that the dissenting opinion referred to the branch of the case we have just been discussing. A very cursory examination of the transcript will show that the Court of Claims was not divided on the question of the claim for demurrage.

(2) It scarcely seems necessary to discuss the second proposition. The meaning of the word "about" is so well known that no definition need be given.

Benj on Sales, Par. 691.
96 U. S., 168–171–172.
115 U. S., 189–204.
57 N. Y. super. ct., 57.
54 Md. R., 187.
7 Ind app., 462–467.
5 Gray (Mass.), 589.
6 El. & Bl., 675–678.
2 Camp., 56.
L. R., 5; P. C., 203–217.
1 P. C. Div., 155–158.

It is only a question of whether or not, under the circumstances surrounding this particular case, the delivery of 4,634 tons of coal was the delivery of "about 5,000 tons" of coal. It seems clear that it was.

It will be observed that the appellant, by his letter of June 22, 1898 (Rec., p. 10), refers to the fact that the first vessel carrying coal contracted for under the second contract would have a capacity of about 2,200 tons. From this it is reasonably to be inferred that it was the intention that the next vessel would contain the balance necessary to fulfill said contract. To have done so it would have been necessary for said vessel to have carried 2,800 tons. The first vessel, which had a guaranteed capacity of 2,200 tons, actually had on board 2,179 tons (Rec., p. 12). The second vessel, the *General Gordon*, in order to have made the exact 5,000 tons, should have had on board 2,821 tons. It actually

had on board and delivered 2,455 tons. Delivery from both vessels was completed about the same time, the last date being October 7, 1898. So far as the findings show, nothing was said at that time by the agent of the United States to the shipowners or the shippers about the delivery of a further consignment of 366 tons, nor was any communication had with the appellant looking toward further delivery under said contract. No demand was made at any time for the 366 tons. If any had been, we think, with all due respect to the dissenting opinion of the Court of Claims, that the United States would not have been justified in going into the market in case the demand was refused, and buying the coal necessary to make the delivery equal to 5,000 tons. The vendor could very well and justly have answered the demand by saying that the contract in question was for "about 5,000 tons;" that it was well known to the contracting parties that the coal in question would have to be transported long distances by ship; that the vendee or consignee certainly could not expect the exact, the identical, amount named in the contract to be loaded on two ships or three ships carrying full cargoes; that the vendee or consignee certainly knew, or should have known, that there would in all probability be a variation between the guaranteed capacity of the vessel and the amount which could be actually loaded therein; that in using the word "about," the vendor had intended to provide for just such a contingency; that the amount actually delivered from the two vessels was so near the 5,000 tons mentioned as to be

"about 5,000 tons." In short, it seems clear that the appellant would have been absolved from further delivery under his contract after delivering the amount carried by the two vessels in question, even if a demand had been made upon him therefor, and, as the learned member of the Court of Claims dissenting from the opinion of the court well says, "It is a poor rule that won't work both ways."

The appellant did not charter another vessel to carry the 366 tons, but purchased the same from a vessel lying in harbor at the port of Honolulu. Was he aware at the time he made the purchase that the United States considered the contract closed? Had the United States at the time he made such purchase actually refused the coal? As to these pertinent points the findings are silent. Pertinent we say, because if the 366 tons of coal were purchased in good faith, under the belief that the United States was expecting and looking for further delivery under said contract, the appellant would, before purchasing the same in the harbor of Honolulu, have had some communication with the agent of the United States who was located at that harbor with reference to the delivery of the same. So far as the findings show, the first intimation the United States had that the vendor regarded himself as bound to make a further delivery under said contract was when the coal was tendered, presumably at the wharf. It should be borne in mind that this was one month subsequent to the last delivery. It seems to us the natural and proper thing for the vendor to

have done under the circumstances would have been to go to the agent of the United States and say to him: "Our contract for the delivery of 'about 5,000 tons of coal' is not yet completed. We are still bound to furnish you 366 tons of coal. We can purchase the same from a vessel now in harbor. Shall we deliver it?" Had any such conversation occurred, unquestionably the vendor would have been advised that he need not purchase the coal; that the United States did not need it, and regarded the contract as closed.

From the fact that coal sold in the harbor immediately after this purchase for about $3 per ton less than the contract price, it is inferable, it seems to us, that the price paid for it by appellant was not greater than that for which he sold it. It is not intended by this remark to suggest that the measure of damages should not be the difference between the contract price and the price the coal actually sold for in market, if there is any legal liability for damages at all, but the purpose is to call attention to what we believe to be a motive for the purchase and tender of the 366 tons in question. It is a well-known fact that coal was hurried to Honolulu during the summer of 1898 by the Army and Navy from all possible sources. War was in progress, and it was the desire to provide a large stock of this commodity for possible emergencies. The price of coal consequently went up. By the 1st of November the war was over. The necessity for the accumulation of a large quantity of coal by the Army and Navy, apparent when this coal was purchased, had disappeared.

The result was that not only was there a large stock on hand, but the price of coal dropped very materially. These are historical facts. In the light thereof, and in view of the actions of the appellant, we believe we are justified in drawing the conclusion that the purchase and tender of the 366 tons of coal was an attempt to crowd or force upon the United States, under the pretext of a contract obligation, this amount of coal, on which a clean profit of more than $3 per ton could be made without any risk. If coal sold in the open market for $6 per ton, or thereabout, immediately after the tender was made, it is reasonable to say that inasmuch as the identical coal had just been purchased in the harbor where it was tendered, that not to exceed $6 per ton was paid for it, that being shown to be the price in the open market.

The desire to reap that profit, it seems to us, more reasonably accounts for the purchase and tender than any such high and lofty purpose as is attributed by counsel for the appellant to the act—providing the Government with coal to supply its war ships. Appellant knew, as everybody else at the port of Honolulu knew, that the Government was overstocked with coal at that time.

Counsel for appellant has made some comparisons with a view to showing that 366 tons of coal is sometimes an important factor. Among other things, he suggests that the presence of that quantity of coal in Washington during the recent anthracite-coal strike would have gone far to "dispel the gloom from a

thousand homes." As compared with the stock carried in the average Washington coal bin, 366 tons is a large amount. It may not be insignificant when compared with the capacity of the bunkers of the modern war ship, but when compared with the quantity with which we are here dealing it is small, if not insignificant. It is, in fact, less than 8 per cent under the tentative amount named in the contract. Had it been on the other side of the ledger, so to speak, could the United States have been heard to complain that there was an overdelivery? Had the *General Gordon* been of sufficient capacity and had it actually had a cargo which would have made the aggregate delivery 366 tons in excess of the tentative amount named in the contract, would not the United States have been compelled to accept the entire cargo?

Counsel says that this suit, so far as it relates to this particular item, is predicated upon the fifth article of the agreement, in which the United States promises to pay for 5,000 tons of coal. Had the amount delivered been 8 per cent over the tentative amount named in the first article of the agreement, could the United States have stood on the fifth article and declined to pay for the excess over 5,000 tons? Certainly not; no more than it could have been compelled to pay for 5,000 tons when it only received 4,634 tons. There is no conflict between the first and fifth articles in the contract. It would have been ridiculous to have provided in the fifth article for payment for "about" 5,000 tons, and it is just as ridiculous to argue that 5,000

tons should be paid for whether the amount delivered fell short of or exceeded that amount. It is perfectly manifest that the use of the term "five thousand tons" in the fifth article of the agreement was not for the purpose of fixing definitely the amount of coal to be delivered or to be paid for, but they are merely descriptive words referring to and being regulated by the conditions of the first article of the agreement.

These considerations, coupled with the fact before noticed that the parties delivering and receiving the coal had no correspondence or negotiations whatever looking toward the delivery of the 366 tons previous to the time the same was tendered, clearly warrant the conclusion reached by the Court of Claims, and its judgment should, therefore, be affirmed.

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